Kuna Meat Company *and* Meat Cutters Union Local No. 88, United Food and Commercial Workers International Union, AFL–CIO. Cases 14–CA–19509–2 and 14–CA–19861

September 18, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On September 7, 1990, Administrative Law Judge John H. West issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.[3]

[1] We note that the judge's discussion of the parties' October 12, 1988 bargaining session erroneously attributed testimony by Union Secretary-Treasurer Raymond Davis to Jerome J. Duff, one of the Respondent's attorney-negotiators.

[2] We agree with the judge's finding that the Regional Director acted reasonably in setting aside an informal settlement agreement in Case 14–CA–19509–2. The Board has held that it will permit the setting aside of a settlement agreement and the litigation of presettlement unfair labor practice issues if there has been a failure to comply with the agreement, or if subsequent unfair labor practices have been committed. E.g., *Nudor Corp.*, 281 NLRB 927, 928 (1986); *Sheet Metal Workers Local 80 (SIE Heating & Cooling Co.)*, 236 NLRB 41, 42 (1978). By its postsettlement bad-faith surface bargaining, unilateral changes, and withdrawal of recognition from the Union, the Respondent both breached the express terms of the settlement agreement and engaged in subsequent 8(a)(5) unfair labor practices.

We also agree with the judge's rejection of the Respondent's affirmative defense based on its allegation that the Board's compliance agent approved the Respondent's conduct throughout the postsettlement compliance period. Even if the allegation was true, the Board has found that the General Counsel and/or the Board are not estopped from processing complaint allegations because a respondent has acted on advice received from Board agents. *Dubuque Packing Co.*, 287 NLRB 499, 542 (1987), enf. denied on other grounds 880 F.2d 1422 (D.C. Cir. 1989); *Capitol Temptrol Corp.*, 243 NLRB 575, 589 fn. 59 (1979).

In finding that the Respondent violated Sec. 8(a)(5) by ceasing payments into the contractual benefit funds in March and April 1988, we note that the delinquencies continued thereafter.

In adopting the judge's finding that the Respondent violated Sec. 8(a)(5) by failing and refusing to bargain in good faith with the Union, we do not rely on the judge's quotation of language from *Tomco Communications*, 220 NLRB 636 (1975), or on the notation (''12 x New hires—advise will be Non-U'') in the February 6, 1988 checklist prepared for the Respondent by Attorney Duff.

In finding that the Respondent bargained in bad faith, the judge relied in part on a letter in which the Respondent sought information from the Board's Regional Office as to the procedures for terminating a bargaining relationship. We note that the Respondent stipulated that it sought this information and did not object to the admissibility of the stipulation.

In affirming the judge's finding that the Respondent violated Sec. 8(a)(1) by interrogating individuals on May 12, 1988, about a union meeting, we rely on the legal standard set forth in *Rossmore House*, 269 NLRB 1176 (1984), rather than on *Johnnie's Poultry Co.*, 146 NLRB 770 (1964), which was cited by the judge.

[3] Because the provisions of employee benefit fund agreements are variable and complex, we leave to the compliance stage the question of whether the Respondent must pay any additional amounts into the benefit funds in order to satisfy our ''make-whole'' remedy. Any additional amounts shall be determined in the manner set forth in *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979). Furthermore, any sums owed by the Respondent to employees as a consequence of its unlawful unilateral changes shall be computed in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970).

Member Raudabaugh notes that some of the unlawful conduct in this case, regrettably, was committed by the Respondent's attorneys. Unlawful conduct is particularly reprehensible when committed by attorneys who are sworn to uphold the law. The attorneys in this case were not named as respondents. In cases where attorneys are named as respondents and are found to have committed unlawful conduct, Member Raudabaugh would not hesitate to order meaningful remedies against such attorneys.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Kuna Meat Company, St. Louis, Missouri, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dorothy D. Wilson, Esq., for the General Counsel.
Jerome J. Duff, Esq., of St. Louis, Missouri, for the Respondent.
Donald K. Anderson Jr., Esq., of St. Louis, Missouri, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOHN H. WEST, Administrative Law Judge. On a charge filed May 20, 1988,[1] as amended on July 6 by Meat Cutters Union Local No. 88, United Food and Commercial Workers International Union, AFL–CIO (Union) against Kuna Meat Company (Kuna), a complaint was issued July 6 alleging that Kuna violated Section 8(a)(1) and (5) of the National Labor Relations Act (Act), collectively by (1) withdrawing its recognition of the Union on April 25; (2) ceasing on April 30 to pay contributions to the Union Health and Welfare Fund, discontinuing health and welfare coverage of the involved unit[2] and implementing a different health insurance plan for the unit, without prior notice to the Union and without having afforded the Union an opportunity to negotiate and bargain as the exclusive representative of the unit;[3] and (3) interrogating its employees on May 12 regarding their and their fellow employees' union membership, activities, and sympathies (G.C. Exh. 1(d). On September 8, the Regional Director for Region 14 of the National Labor Relations Board (Board) approved an informal settlement agreement in that case. On January 4, 1989, the Union filed a charge in 14–CA–19861, which charge was amended on February 7, 1989, and on February 7, 1989, an amended consolidated complaint was issued which consolidated the above-described cases, vacated and set aside the settlement agreement, reiterated the

[1] All dates are in 1988 unless otherwise indicated.

[2] The following employees constitute the involved unit:

> Head meat cutter, journeymen and apprentice meat cutters, semi-skilled employees, custodians, porters and laborers employed at the Employer's St. Louis facility, EXCLUDING office clerical and professional employees, guards, and supervisors as defined in the Act.

[3] Upon a charge filed August 9, the complaint was amended (G.C. Exh. 1(k)), to indicate that on March 10, Respondent ceased making contributions to the pension plan as required by the collective-bargaining agreement between Kuna and the Union; that on April 10, Kuna ceased making contributions to the aforementioned health and welfare fund; and that on April 25 Kuna implemented a different health insurance plan for the unit.

above-described violations,[4] alleged that Respondent violated Section 8(a)(1) and (5) of the Act, collectively, for the above-described reasons and because Respondent (A) during meetings it had with the Union in September, October, and November 1988, set time limits on contract negotiations, and made contract proposals designed to frustrate reaching a collective-bargaining agreement with the Union thereby failing to bargain in good faith with the Union; and (B) on December 1 implemented its final contract proposal and made numerous changes affecting the unit,[5] without reaching a valid impasse and, therefore, without having afforded the Union a sufficient opportunity to negotiate and bargain, and alleged that by the acts set forth in (A) and (B) above, Respondent failed to comply with the aforementioned informal settlement agreement and, therefore, it was vacated and set aside. Respondent denies violating the Act.[6]

A hearing was held on May 15–18, 1989, in St. Louis, Missouri. Briefs were filed by General Counsel and the Respondent.[7]

On the entire record in this proceeding, including my observation of the witnesses and their demeanor, and after considering the aforementioned briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

Kuna, a Missouri corporation, is a wholesale processor and distributor of food products with a facility in Saint Louis. The complaint alleges, Kuna admits, and I find that at all times material it has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is now, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

[4] The complaint was amended at the hearing to include the allegation that Respondent also withdrew recognition of the Union on January 1, 1989.

[5] Such changes included changing the health and welfare and pension plans covering the unit, reducing the number of holidays and vacation days for the unit, implementing a profit sharing plan about January 1, 1989, and implementing new classifications and wage scales for the unit.

[6] The Respondent pleads the following affirmative defenses:

(a) The Union has not represented a majority of the unit employees since April 25, 1988.

(b) The subject labor agreement expired, without qualification, on or before November 30, 1988.

(c) All references in the amended consolidated complaint to the union sponsored medical plan and/or pension plan are moot by reason of the subject settlement agreement and related compliance procedures. All required payments to these plans were made through the compliance agent. Timely notice of the termination of the plans on November 30, 1988 was given to the Union, the plans' administrator and to the compliance agent, without objection and with the approval of the compliance agent.

(d) The absolute failure of the Regional Director to notify the Employer of any violation of the subject settlement agreement and the related compliance procedure between September, 1988, and February 7, 1989 (5 plus months) constitutes a waiver and estoppel to any further alleged unfair labor practice by the Employer.

(e) Any alleged unfair labor practices attributed to the Employer on or after August 8, 1988, (6 months prior to the issuance of the subject amended, consolidated complaint on February 7 . . . [1989]) is barred by Sec. 10(b), NLRA.

(f) The actions and conduct of the Regional Director in setting aside the subject settlement agreement, without notice or warning to the Employer, are arbitrary and capricious in every respect and constitute a gross abuse of his administrative authority and/or discretion.

(g) By reason of the affirmative defenses pleaded thus far herein, the issues alleged in the amended consolidated complaint are res judicata.

[7] The Charging Party adopts the brief of General Counsel.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

The Union has represented a unit of Respondent's employees for as many as 25 years, with the most recent contract effective from April 23, 1985, to April 24, 1988, at midnight (G.C. Exh. 2). On February 6, Respondent's president, Donald Bippen, forwarded a letter (G.C. Exh. 4), to the Union which reads as follows:

> We herewith give you notice that our company terminates its collective-bargaining agreement with you, as at midnight, April 24, 1988.
>
> If you have any questions, you should contact our attorney, A. Michael Sullivan. . . .

The letter was sent pursuant to a checklist dated February 6 (G.C. Exh. 20(d)), which list is attached hereto as Appendix A.[8] [Ommitted from publication.] The list was prepared by Jerome J. Duff, an attorney who was retained to represent Respondent in its contract negotiations and related matters.

Raymond Davis, who is secretary-treasurer of the Union, held a prenegotiation meeting with the employees in the involved unit on February 11. Seven[9] of the 11 employees in the involved unit attended. It was agreed that the Union would propose to continue the terms of the collective-bargaining agreement in effect at the time, with a 4-percent wage increase for a 3-year period.

On February 22, Davis forwarded a letter to Respondent indicating that the Union wanted to negotiate a new contract and he requested the Respondent to contact the Union regarding the commencement of negotiations.

On February 29, Sullivan met with the Union's attorney, Donald Anderson Jr., to discuss the topics to be negotiated and to arrange the meetings.

On March 31, Respondent made its payment to the Union's health and welfare fund but it did not make the payment to the Union's pension plan (G.C. Exh. 16). Respondent also failed to make a timely payment in April 1988 to the health and welfare fund.

At the first negotiating session, which was held on April 18, Union representatives Anderson and Davis gave the Union's written proposal to the Company's representatives, Sullivan and an associate. The proposal called for a 3-year contract with 4 percent increases across the board each year (G.C. Exh. 6). Sullivan said that he would present the proposal to his client and get back to Anderson to set up another meeting. Davis testified that he requested that the health and welfare and pension remain intact.

On April 21 or 22, Davis went to Respondent's facility and told Shop Steward Hock, that while the contract was expiring, the Union and Kuna had another negotiating session coming up. Donald Bouckaert, who is an employee of Respondent and a member of the involved unit, testified that Shop Steward Hock told him to go to work on Monday, April 25.

[8] One of the entries on the list is very interesting, namely, ''12x New hires-advise will be *Non*-U.'' [Emphasis in original.]

[9] In his affidavit to the Board, Davis indicated that five attended the meeting. Steward Robert Hock testified that seven employees attended the meeting.

By letter dated April 22, Sullivan advised the Union that he would meet on April 25 at Anderson's office (G.C. Exh. 7).

On April 25, an employee meeting was held at 4:30 a.m. at Kuna.[10] Bouckaert testified that the meeting was attended by the meatcutters, Donald Bippen, Sullivan, and Audie Faulstick, who is an insurance agent; that Faulstick told the employees that the Employer would be providing medical insurance and the employees were asked to select a primary physician from a listing provided to them; and that the employees were told that there would be another meeting to explain the plan to their spouses. Sullivan testified that Respondent had prepared for a strike on April 25 and when there was none ''a decision was made that the Union was not interested anymore, and, therefore, we no longer had any relationship with the Union.''

The parties stipulated that Kuna had medical insurance coverage through Blue Choice [sic] for the period April 25, 1988, through January 14, 1989, and had medical coverage for their unit employees through Aetna from January 1, 1989, to the time of the hearing herein.

The representatives of Kuna and the Union met, as scheduled, on April 25. In attendance were Anderson and Tim McGuire, who is an associate, Davis, Edward O'Reilly, who is the president of the Union, Sullivan, and Duff. Sullivan introduced Duff. Davis testified that the union representatives were informed that Kuna considered the contract terminated and Kuna was withdrawing its recognition of the Union because the Union no longer represented a majority of the employees; that Kuna representatives had previously met with the employees and Kuna had abolished the health and welfare and pension programs of the Union; that he advised Kuna representatives that there might be a withdrawal liability involved in leaving the pension program; that Duff said that he had done his homework and that there would be zero liability; that Sullivan requested that the administrator of the pension program be contacted to determine what the liability would be; that Kuna representatives took the position that the Union did not represent the employees because it had not filed a grievance in about 2 years and the members did not attend union meetings; that Duff said that the Union had goofed since the contract had expired and the Union did not strike or inform the employees what was the Union's intention; that he telephoned the administrator's office and he left the room while Sullivan talked with someone in that office; that Sullivan later said that he was going to meet with someone in the pension fund manager's office in order to determine what the withdrawal liability situation was and then the Union would be contacted for another meeting; that Kuna did not make any contract proposal during this meeting; and that before this meeting, Kuna did not inform the Union about plans to implement a new medical coverage for the employees or that it was going to cease coverage by the Union's plan.

The Union called a meeting of the 11 involved employees on May 2. Seven showed up. Davis, who presided at the meeting, asked the employees present to sign a card to show that they still supported the Union. Only two of the employees signed. Davis had assured the employees present that the Employer would not know who signed or who did not sign. About a week later, steward Hock, who apparently attended the meeting, told Davis that the reason that more of the employees did not sign the cards was that they knew in advance that one of the employees present, Robert Campey, was going to report back to the Company what was said and what was done at this meeting.

Bouckaert testified that about 2 weeks after April 25, Kuna held a meeting at a restaurant on a Saturday to further explain the medical insurance to the involved employees; that Faulstick said that there would be no dental coverage under the plan; that under the union plan the employees did have dental coverage; that Donald Bippen then said that the employees could get a dental plan with the union dues that they were not paying; and that a meeting was scheduled for the following Saturday to discuss profit sharing but the meeting was subsequently canceled.

On May 9. Sullivan forwarded a letter to the Union (G.C. Exh. 8), which reads, in part, as follows:

> This letter will confirm our meeting on April 25, 1988, at which time I advised you that our client, Kuna Meat Company, had purchased Health and Welfare Insurance on its employees, in lieu of any insurance that would be provided through your Union. Further, that no further contributions would be made to the Health and Welfare Plan of Local 88.

On May 12, Duff and Sullivan interrogated a number of the employees who attended the above-described May 2 union meeting. Bouckaert testified that while he was working he was told to go to Donald Bippen's office; that Donald Bippen, Duff, and Sullivan were there; that Duff introduced himself and explained that he knew that the employees had a meeting at the union hall on May 2 and he knew what happened at the meeting; that Duff said that he understood that a card was passed out for the employees to sign to indicate whether or not they were going to be with the Union and no one signed the card; that he told Duff that he, Bouckaert, had signed the card and that he did not know whether the other employees signed except that another employee present at the union meeting, Campey, threw his card on the table and said that he would not sign the card; that he told Sullivan that he thought that the employees had to take a vote to get out of the Union and Sullivan said that this was wrong and some large companies, when the contract is up, lock the employees out and pick out who they want to work but Kuna would not do this; and that neither Duff nor Sullivan told him that he did not have to talk to them or that no action would be taken against him if he did not talk to them. Regarding these meetings, Sullivan testified that the purpose of the meetings was to find out what happened at a union meeting on May 2; that he, Duff, and Bippen met with one employee at a time; that they spoke with between five and seven employees; that Duff told the employees that the Employer was preparing to end the relationship with the Union and that he had learned from unsolicited information that these individuals had been called into a meeting at the union office the week before; that Campey said that he had not signed a card; that Bouckaert said that he had signed a card; and that Bippen was present throughout the meetings. Donald Bippen testified that Sullivan did tell Bouckaert that large

[10] Apparently notice of the meeting was posted on the bulletin board on either April 21 or 22.

corporations can lock employees out and pick who they want from the parking lot but Kuna would not do that; and that Sullivan and Duff did the talking and he was there as an observer.

On May 16, a negotiating session was held at Sullivan's offices. Duff, Sullivan, Anderson, O'Reilly, and Davis were present. With respect to this meeting, Davis testified that Duff told O'Reilly that he was remiss in his duties in not attending the first two meetings; that there was a lengthy discussion on health and welfare and pension withdrawal liability; that the Kuna representatives indicated that the Union failed to represent the involved employees and they were aware that Davis had held a meeting of the employees and from what the employees told them the Union no longer represented a majority of the employees; and that nothing in the way of negotiation topics or contract proposals were discussed in that meeting.

As noted above, the Union filed a charge in Case 14–CA–19509–2, a complaint was issued on July and an informal settlement agreement (G.C. Exh. 9), was entered into on September 8. Respondent agreed that it would not withdraw recognition from the Union, unilaterally discontinue coverage for employees under the Union's health and welfare insurance plans, implement its own insurance coverage, and unilaterally discontinue payments for employees under the Union's pension plan. Respondent agreed that it would meet and bargain with the Union in good faith, resume payments to the Union's pension plan and reinstate coverage for its employees under the Union's health and welfare insurance plan, make its employees whole for any losses they may have suffered because it changed insurance plans, and pay to the Union's pension all moneys due on behalf of its employees for the period when it failed to make contributions.

Duff forwarded a letter to Anderson on September 9 (G.C. Exh. 10b), which reads, in part, as follows:

> For all purposes related to this settlement and the related compliance period, Kuna considers that Monday, November 7, 1988 is the last day of the compliance period. Unless you specifically advise otherwise, within the next week, we will assume that you are in agreement with this calculation.

The next negotiating session was held on September 14. Present were Duff, Sullivan, McGuire, O'Reilly, and Davis. Regarding this meeting, Davis testified that

> The Company stated . . . that they were there as a result of a compliance order, and they were going to negotiate with the Union, but that there was no enforcement of obtaining a contract at the end of the negotiations.
>
> They were there to negotiate only; that there was a lengthy discussion over the health and welfare, and pension program, and Sullivan requested the Union to supply some documents; and that either Duff or Sullivan indicated that they would not negotiate beyond November 7 since they did not ''feel like they was compelled to negotiate beyond that point.''

Kuna's negotiation agenda for the meeting of September 20 includes, in part, the following: ''UNION'S POSITION IN REGARD TO COMPLETION OF NEGOTIATIONS PRIOR TO NOVEMBER 7, 1988 IN ORDER TO AVOID ANY EXTENSION BEYOND THAT DATE.'' (G.C. Exh. 11.) Davis testified, with respect to this meeting, that the Union's expressed position was that it realized that the compliance order would end November 7 but the Union was there to negotiate a contract and it would meet far beyond that date.

At the September 27 negotiating session the parties reviewed the contract article by article from article 1 to about article 13.[11] According to Davis' testimony, at this meeting Kuna proposed that (1) employees not be paid overtime until they had worked 40 hours; (2) the workweek would be 6 days; (3) the free floating holidays and the birthday holiday in the expired contract be eliminated; (4) the probationary period be changed from 31 days to 6 months; (5) vacations would be reduced from a maximum of 6 weeks to a maximum of 2 weeks; (6) there be only one classification and that would be head meatcutter and there was no need for the journeyman, apprentice, semi-skilled, the laborer, and porter; (7) while the last contract between Kuna and the Union provided that the Employer could have a second and third shift if it negotiated with the Union regarding wages and working conditions, Kuna now wanted to be allowed to have a second and third shift without any reference to negotiations with the Union; (8) while the last contract between Kuna and the Union called for overtime to be voluntary,[12] Kuna now wanted overtime to be mandatory; and (9) while the expired contract had portion control language, Kuna wanted to delete this language so that it would not be required to have meat cut on the premises.

On October 3 Duff forwarded a memorandum to a Board compliance officer seeking information about the procedures for decertification and withdrawing recognition from the Union.

Duff, Sullivan, Anderson, and Davis attended the October 4 negotiating session. Davis testified that at this session Kuna proposed to delete the articles dealing with the unloading of trucks, the leave of absence clause, and the successor and assignee clause; that Kuna wanted to eliminate their obligation to pay any employee who was hurt on the job for the first 3 days after the injury until workmen's compensation takes effect; that Kuna wanted to delete any reference to discrimination of sex in the company proposal, since the Company did not have any female employees in the bargaining unit and it did not expect to hire any female employees; that Kuna agreed to the separability clause; that Kuna agreed to leave sick leave in the contract but at its discretion it would decide how to pay an employee for sick leave; that while the Union was discussing a 3-year contract, Kuna indicated that it wanted a 1-year contract; that while the last contract allowed Kuna to have part-time help, it had to negotiate hours and working conditions with the Union; and that Kuna wanted to eliminate this obligation.

The October 11 negotiating session was attended by Duff, Sullivan, Anderson, Davis, and Mel Traub, of the Meat-

[11] Duff, Sullivan, Anderson, Davis, Lee Ives, and Jim King, both business representatives of the Union, were present. Also, Dave Gallagher, a business representative of Local 682 of the Teamsters, attended at the behest of Davis. That Union had a contract with Kuna.

[12] Under the expired contract if Kuna did not get enough volunteers, it would assign the overtime by reverse seniority or, in other words, the least senior person could be compelled to work overtime.

cutters, Local 88. Kuna presented a written proposal (G.C. Exh. 12). Davis testified that Kuna proposed (1) freezing the bargaining unit at 11 employees and Duff said that through the years, by attrition, the unit would evaporate and cease to exist; (2) having one head meatcutter and the rest of the employees would be called utility employees; (3) paying the head meatcutter $12.75 an hour and the utility people $8 an hour;[13] (4) providing a health and welfare and pension program with the cost to Kuna being no greater than what it had paid under the last contract; and (5) a quality clause, which stated that if an employee, in Kuna's opinion, was not performing up to the Employer's standards, the employee would receive 31-day notice, which would not be subject to the grievance procedure, and if there was insufficient improvement, the employee would be terminated without recourse to the grievance or arbitration procedure of the contract.

Duff, Sullivan, Anderson, and Davis attended the negotiating session on October 12. Duff testified, regarding the meeting, that the Kuna representatives insisted that Kuna's proposal be presented to the employees; that he indicated during the meeting that he did not agree with the proposal and he would not present the proposal to the employees but that he would present a final proposal.

On October 14 Duff, in a three-page memorandum to a Board compliance agent, requested information from the Board regarding the procedures for decertification, withdrawing recognition from the Union, when and how Kuna could do that.

At the October 18 meeting, which was attended by the same representatives, Kuna dropped its request for a frozen unit. The recognition clause and the classification of employees were the main topics of discussion at this meeting.

The October 25 negotiating session was attended by the same representatives. The Union presented a one-page proposal relating to the recognition clause and the job classification of employees (G.C. Exh. 13). Recognition or bargaining rights and classification[14] was discussed and Kuna representatives again asked that Kuna's October 11 proposal be referred to the employees for a vote.

On October 28, Kuna presented its final offer with a cover memorandum (G.C. Exh. 14). The memorandum states, in part, as follows:

> IT IS KUNA'S INTENTION TO TERMINATE THESE NEGOTIATIONS AT 5:00 P.M. ON WEDNESDAY, NOVEMBER 9, 1988. KUNA WILL NOT AGREE TO EXTEND THESE NEGOTIATIONS BEYOND THAT DATE UNLESS KUNA IS PERSUADED TO DO SO BY THE NLRB COMPLIANCE OFFICER.

Also the memorandum states that other than the modifications to articles 1 and 3, Kuna's final proposal remains exactly as set out in its October 11, 1988 proposals. Article 1 deals with recognition and article 3 deals with classification. With respect to the latter, it specifies that newly hired utility employees shall perform any job assigned, except the duties of the head meatcutter, and that present nonunion employees of Kuna will continue to perform any job assigned, including delivery operations, as nonbargaining unit employees who are not covered by the terms and conditions of the 1988–1989 labor agreement. Sullivan testified that there was considerable discussion about the procedure the Union planned to use to take the vote on the contract offer and that Kuna was very concerned about the fact that the Union was going to take 10 days to get a vote on Kuna's final offer since there was a question of whether the 10 days would take it outside the asserted end of the compliance period.

The parties stipulated that there was a brief negotiating meeting on November 9.

The next meeting between Kuna and the Union was held on November 21. Duff, Sullivan, Anderson, and Davis were present. The Union informed Kuna that its final offer had been rejected.[15] The Union suggested that the expired contract be extended for 1 year for a cooling off period. Davis testified that Kuna took the position that it had met the compliance requirements and that it had no obligation to negotiate further. It was agreed that the rejection would be discussed with Kuna's management and the parties would meet the following day.

The meeting on November 22 was very short with Kuna representatives indicating that they did not intend to negotiate further and that they had information that a decertification petition would be filed.

By letters dated November 30, Sullivan advised the Union's pension fund and its welfare fund that Kuna was terminating its participation, General Counsel's Exhibits 17 and 18, respectively.

On December 2, Duff forwarded the following letter (G.C. Exh. 19), to Anderson:

> This will reconfirm our previous advices [sic] that the NLRB mandated negotiations have terminated by absolute impasse. Kuna has received the acknowledgement of its termination of participation in the Local 88 Welfare fund from the board of Trustees. Kuna has a replacement medical Plan.
>
> This will further confirm that Kuna will proceed to implement the employment conditions spread in Kuna's final (rejected) offer, with the exclusion of any references to Union recognition, Union membership or Union participation in any term or condition of employment.

On January 1, 1989, Respondent implemented its profit sharing plan. Donald Bippon testified that when Kuna implemented its profit sharing plan it withdrew its recognition of the Union; that as of January 1989 the 10 employees in the above-described unit had their vacation reduced by 5 days; and that the employees were told that the reason for this was

[13] Under the last contract between Kuna and the Union, the head meatcutter made $13.75 an hour and the journeymen meatcutters made $12.50 an hour. Kuna's written proposal contains the following language: ''KUNA WILL ALSO DESIGNATE A RED CIRCLE (OVER SCALE) PAY RAISE FOR ANY OF THESE ELEVEN UNIT EMPLOYEES, AT KUNA'S OPTION AND SOLE DISCRETION.'' Kuna did not, however, present a proposal during negotiations that would guarantee that each of the current employees would not have their wages reduced.

[14] The Union's position in G.C. Exh. 13 was that there would be a head meatcutter, a journeyman, an apprentice, a utility man with a knife, and a utility man without a knife.

[15] Davis held a ratification meeting on November 3. Five members attended. A ballot was passed out with the understanding that the members would have 10 days to consider the proposal. On November 14, three members mailed back their ballots with two voting to reject the proposal and one voting to accept the proposal.

the cost of the profit sharing plan, which cost Respondent $200 more a month than it paid into the Union's pension plan.

As noted above, on January 4, 1989 the Union filed the aforementioned charge. The following day a decertification petition was filed by employee Bruce Boston in Case 14–RD–1238. The petition was dismissed by the Regional Director and the dismissal was affirmed by the Board.

Respondent's Exhibit 6 is a letter to the Union dated January 9, 1989 which reads as follows: ''[t]his letter is to inform you that the list of signatures below are those of Kuna Meat employees who had belonged to . . . [the Union] and have now self-organized. The decertification procedures have been initiated with the . . . Board.'' The letter has 10 signatures. Regarding the letter, Boston testified that he obtained all of the signatures thereon; that he went from person to person in the plant to obtain the signatures and two of the employees were in the break room when he obtained their signatures; and that he obtained all of the signatures before he left Kuna's facility in its truck at 8 a.m. Employee Richard Nickolaus testified that he signed the letter in the afternoon about 3 or 4 p.m.; that he thought he was outside of work in the parking lot; and that he gets off work at 1 p.m. Employee Walter Brown testified that ''[i]t seemed like we signed it at the office at Kuna Company.'' And employee Bouckaert testified that Boston asked him to sign the letter while he, Bouckaert, was working; and that Boston aggravated him and he lost his temper and he said ''give me the damn thing, I'll sign it. . . .''

On January 14, 1989, Respondent changed the involved employees medical plan from Blue Choice [sic] to Aetna. It was stipulated that the Blue Choice [sic] plan did not provide dental coverage, life insurance [sic] or disability and the employees were not permitted to select their own doctor; and that while the Aetna plan does provide life insurance and disability, it does not provide for dental coverage.

B. *Contentions*

On brief General Counsel contends that the March and April pension payments and the April health and welfare payment were contractually required and, absent agreement of the Union, Respondent's failure to comply with the contract constitutes a midterm modification of the agreement and violates Section 8(a)(5) of the Act; that inasmuch as the provisions of health and welfare coverage is a mandatory subject of bargaining, Respondent also violates Section 8(a)(5) by either changing or supplementing the medical coverage of unit employees unless it has first notified and bargained, which it did not, with the Union; that Respondent violated Section 8(a)(1) and (5) of the Act by ceasing payments to the Union's pension and health and welfare plans and by implementing new medical coverage for unit employees; that a Union enjoys a rebuttable presumption of majority status upon the expiration of a collective-bargaining agreement; that the Employer may rebut the presumption by establishing either that the Union in fact did not enjoy majority status or that the refusal to bargain was predicated on a good-faith and reasonably grounded doubt, supported by objective considerations of the Union's majority status; that while according to Sullivan, Respondent based its April 25 withdrawal of recognition on the following factors: (1) minimal contact with the Union, (2) lack of grievances, and (3) a number of letters from the Union to enforce the union-security clause, General Counsel questions whether Respondent established at hearing that any of these factors existed on April 25; that even if Respondent could establish it had information which would establish a good-faith doubt of the Union's majority status, that must be raised in a context free of unfair labor practices; that here Respondent had already unilaterally ceased payments to the Union's health and welfare and pension plans and, therefore, Respondent's assertion of a reasonable doubt was ''fatally tainted by its commission of the 8(a)(5) unfair labor practice of unilaterally ceasing the contractually mandated fringe-benefit contributions for the vast majority of the unit employees,'' *Abbey Medical/Abbey Rents*, 264 NLRB 969 (1982), enfd. 709 F.2d 1517 (9th Cir. 1983); that regarding Respondent's admitted withdrawal of recognition on about January 1, 1989, Sullivan explained he believed the parties were at an impasse in November, and as he understood total impasse, that means that there is no recognition; that no evidence can be found in the record whatsoever to support this withdrawal of recognition; that regarding the petition for decertification filed on January 5, 1989, by Boston and the letter signed by employees on January 9, 1989, obviously both of these events occurred after Respondent withdrew recognition from the Union on January 1, 1989; that Respondent cannot rely on events occurring after its withdrawal of recognition because these events may have been prompted or skewed by Respondent's conduct; that there is no showing, other than the January 9, 1989 letter, that the decertification petition was supported by a majority of the employees, and at least one employee signed the letter out of frustration, and another employee testified that while he did not consider Boston to be management, he considered Boston to speak for management; that the January 1, 1989 withdrawal of recognition also violated Section 8(a)(5) of the Act; that regarding the interrogation on May 12, if Respondent was attempting to poll its employees to support its withdrawal of recognition, it had no reasonable basis for doubting the Union's continued majority status at the time it withdrew recognition and could not, after taking such action, rely on evidence of employee dissatisfaction disclosed through the instant interrogation; that Respondent's action may well have contributed to an erosion of support for the Union; that to the extent Respondent attempts to characterize the questioning as a poll, it was unlawful; that the necessary assurances to employees were not provided; that while Duff did not state his remarks to Bouckaert in the form of a question, Duff made declarative statements and waited for Bouckaert to either agree or disagree; that whether an interrogation is unlawful is determined by considering the totality of the circumstances; that the coercive nature of this interrogation is readily established by the fact it occurred in the office of and in the presence of Respondent's chief executive officer, employees were brought in individually, and the nature of the subject matter, i.e., whether employees had signed cards showing support for the Union from whom Respondent had withdrawn recognition; that the test of whether an employer violated Section 8(a)(1) and (5) of the Act by failing to bargain in good faith with a union is whether the totality of the employer's conduct throughout the course of its bargaining evidences an intent to frustrate the bargaining process rather than a sincere purpose to reach an agreement; that the totality of circumstances here establishes beyond doubt that Respondent

had no intent to reach agreement when one considers (1) Respondent's insistence from the outset that negotiations would not extend beyond the 60 days of the compliance period, (2) Respondent's continued questioning of the Union's majority status during the time when it was supposed to be recognizing the Union as the majority representative and bargaining with the Union, and (3) the nature of the proposals themselves which in their initial and final form would have given Respondent almost total discretion to do whatever it wanted during the term of the contract; that an examination of the circumstances of this case should commence with the fact that negotiations in September began after Respondent ceased paying into the Union's health and welfare and pension plans and withdrew recognition from the Union; that while Respondent then entered into an informal settlement agreement and commenced meeting with the Union, from the outset Respondent made it clear it would only bargain with the Union for the 60 days mandated by the terms of that settlement agreement; that Respondent was only going through the motions of these postsettlement negotiations without intent to reach agreement and was anxiously counting the days until it could again withdraw recognition from the Union; that while waiting for the arrival of the ''cut off date'' during ''negotiations,'' Respondent was also investigating the procedures for decertification and how it could withdraw recognition from the Union notwithstanding the fact that it had agreed, pursuant to the settlement agreement, to recognize and bargain with the Union as the bargaining representative of its employees; that the themes throughout Respondent's contract proposals were to decrease wages and benefits and to give Respondent the sole 'option' or 'discretion' to do whatever it wanted without interference with the Union;[16] that Respondent proposed to gut the contract and preclude any possibility of agreement;[17] that Respondent deleted the requirement that discharges be for cause; that Respondent's contract proposals were so unacceptable and without justification as to compel the conclusion that Respondent had no intention of reaching an agreement with the Union; that Respondent failed to bargain in good faith with the Union in violation of Section 8(a)(5) of the Act; that the January 1989 changes regarding the health and welfare and pension plans were violative of Section 8(a)(1) and (5) of the Act because any impasse reached was a result of Respondent's refusal to bargain in good faith and was not ''legally cognizable,'' *Hudson Chemical Co.*, 258 NLRB 152, 157 (1981); that regarding Respondent's affirmative defenses, the record does not support a finding that the majority of employees did not wish to be represented by the Union on April 25, or at any other time; that while the collective-bargaining agreement expired by its terms on April 25, that did not eliminate Respondent's obligation to notify and bargain with the Union before changing any term or condition of employment of the employees covered by that agreement; that while Respondent went through the motions of bargaining with the Union in September and October, because it did not bargain in good faith it did not reach a valid impasse and, therefore, was not thereafter free to change any existing conditions of employment; that since approval of the settlement agreement was revoked, the events occurring before than are nor res judicata or moot, nor are they barred by Section 10(b) of the Act; that the Regional Director's revocation of approval was not an abuse of discretion; that regarding comments allegedly made by the compliance agent that ''everything was perfect,'' and she was ready to close the file, the Board has repeatedly held that statements of a Board agent indicating that a charge would be dismissed are irrelevant; and that the Board is not estopped from processing complaint allegations because of what an agent may have said to representatives of Respondent.

Respondent, in its seven-page brief, argues that it entered into an approved settlement agreement on September 8, and the settlement should have served to wipe out any prior questionable conduct on the part of the Employer; that it ''is satisfied that it properly fulfilled the compliance . . . contingency by an exhaustive negotiation with the Union''; that the only other significant fact, which is described throughout the entire record of this ''overburdened proceeding,'' is that the Employer and the Union failed to reach an agreement; that ''the underlying reason for the failure to reach an agreement is spread in the simple sentences of . . . [R. Exh. 6], the letter signed by all ten (10) of the involved unit of employees, to the Union''; that Respondent's Exhibit 6 ''speaks more eloquently than anything else in the 716-page transcript of this case to demonstrate why this complaint should be dismissed''; that three very recent unpublished U.S. Court of Appeals cases support both its negotiation position and its good-faith belief that the Union does not represent a majority of the unit employees; that the U.S. Supreme Court's 1988 decision in *Laborers Health Trust Fund v. Advanced Concrete Co.*, 108 S.Ct. 830, mandates the essential elements of impasse and the Employer is absolutely satisfied that it had reached an impasse in accord within the U.S. Supreme Court's definition and, simultaneously, the Employer was then justified in its withdrawal of recognition; that only then did the Employer begin to unilaterally implement its terms and conditions of employment in accord with its negotiation position; that the Employer knew that the substitution of its profit sharing plan for the Union's pension plan would cost the Employer approximately $200 per month more than the Union's pension plan and this expense ''should not be lost in the maze of the General Counsel's hysterical accusations

[16] General Counsel points out that while Respondent's final offer did not freeze the unit, Respondent expressly stated that current nonunion employees would not be included in the unit or covered by the agreement, but would continue to perform any job assigned and Kuna would not be bound by or subject to any form of union jurisdictional restrictions. General Counsel submits that Respondent could readily circumvent hiring any new employees in the unit by classifying them as warehousemen and then exercising its right to assign them whatever work it wanted. Thus it seems, according to General Counsel, that under Respondent's final offer Kuna would have discretion whether to include new employees in the unit. It is also pointed out by General Counsel that Respondent's very broad management-rights clause insured that Respondent would have absolute discretion to do whatever it wanted without interference from the Union; that Respondent even deleted the requirement that discharges be for cause; and that the only ''restriction'' on its right to discharge would be the quality clause which gave Respondent the sole right to determine quality.

[17] General Counsel points out that Respondent's proposals, which changed only slightly from the beginning of bargaining to the end, were designed to be wholly unacceptable to the Union and to preclude the possibility of agreement. Assertedly, the proposals placed the Union in a position where simple reliance on the rights arising from its status as the majority representative would be more advantageous than signing any contract Respondent was prepared to offer. Further, General Counsel submits that Respondent offered no real justification for the proposed changes, and the fact that when Respondent implemented its final offer, it failed to implement many of the provisions, completely undermines any claim of business necessity for the proposals and further confirms that the proposals were simply designed to preclude agreement.

about rescinding dental plans, disability plans and vacation time''; and that this ''NLRB proceeding has plagued everyone long enough and, in good sense should be ended.''

C. *Analysis*

Collectively, paragraphs 7A and 7B of the consolidated amended complaint allege that on or about March 10 and on or about April 20, respectively, Respondent ceased paying contributions to the pension plan and to the union health and welfare fund, respectively, as required by the collective-bargaining agreement in effect between Respondent and the Union. Since the Union did not agree to the cessation of payments to the pension plan and the health and welfare fund and since mandatory subjects of bargaining were involved, Respondent's refusal to make these payments were unlawful midterm modifications of the collective-bargaining agreement in violation of Section 8(a)(5) of the Act. *Michigan Drywall Corp.*, 232 NLRB 120 (1977).

Paragraph 7C of the consolidated amended complaint alleges that on or about April 25, Respondent implemented a different health insurance plan for the unit. As set forth by the Board in *SAC Construction Co.*, 235 NLRB 1211, 1218 (1978):

> The law is well established that unilateral changes of ''wages and hours and terms and conditions of employment'' by an employer obligated to bargain with the representative of its employees in an appropriate unit violates Section 8(a)(5) of the Act. *Master Slack and/or Master Trousers Corp. et al.*, 230 NLRB 1054 (1977). Benefits, such as payments into health, welfare, and pension funds on behalf of employees, constitute an aspect of their wages and a term and condition of employment which, along with wage rates, survive the expiration of a collective-bargaining agreement and cannot be altered without bargaining. *Harold W. Henson, d/b/a Hen House Market No. 3*, 175 NLRB 596 (1969), enfd. 428 F.2d 133 (C.A. 8, 1970).

Also, as concluded by the administrative law judge in *Parkview Furniture Mfg. Co.*, 284 NLRB 947 at 971 (1987), which conclusions were affirmed by the Board:

> [It] is well settled that on the expiration of a collective-bargaining agreement the law imposes a continuing duty on both parties to attempt in good faith to reach a new agreement and therefore an employer may not unilaterally alter the terms and conditions of employment set forth therein, as it relates to mandatory subjects of bargaining, in the absence of an impasse in negotiations,[107] the Union's loss of majority status,[108] or a waiver.[109]

[107] *Taurus Waste Disposal*, 263 NLRB 309 (1982); *S. Freedman Electric*, 256 NLRB 432 (1981).

[108] *SAC Construction Co.*, supra; *South Texas Chapter, AGC*, 190 NLRB 383 fn. 5 (1971)

[109] *American Distributing Co. v. NLRB*, 715 F.2d 446 (9th Cir. 1983). As stated by the Board in *Cauthorne Trucking*, 256 NLRB 721 (1981):

> [T]he Board has held that health and welfare and pension fund plans which are part of an expired contract constitute an aspect of employee wages and a term and condition of employment which survives the expiration of the contract. . . . Thus, an employer may not unilaterally alter payments into such plans unless: (1) the changes are made subsequent to the parties reaching a bargaining impasse and the union has rejected the changes prior to the impasse, (2) the employer demonstrates that, at the time the changes were made, the union did not represent a majority of the unit employees or that the employer had a good-faith doubt, based on objective considerations, of the union's continuing majority status, or (3) the union has waived its right to bargain regarding the changes.

As noted above, health and welfare coverage is a mandatory subject of bargaining. The Union did not waive its right to bargain regarding this change. Indeed, Respondent did not even give the Union prior notice or the opportunity to bargain before implementing this change. Clearly there was no impasse in negotiations at the time for, as noted above, there were no negotiations at that time. When this change was made the Respondent did not have a good-faith doubt, based on objective considerations, of the Union's continuing majority status. How could it have a good-faith doubt when Respondent itself had already commenced its unlawful campaigning to undermine the Union's support? As noted infra, its unlawful conduct was meant to affect the Union's status. Consequently, Respondent violated Section 8(a)(1) and (5) of the Act.

Paragraph 8 of the consolidated amended complaint, as here pertinent, alleges that on or about April 25 Respondent withdrew its recognition of the Union as the exclusive collective-bargaining representative of the unit. Respondent's withdrawal of recognition occurred in the context of serious unfair labor practices and, therefore, violated Section 8(a)(1) and (5) of the Act. Unlawfully refusing to make payments to the health and welfare fund and to the pension plan during the term of the contract, which as noted above are midterm modifications of the collective-bargaining agreement, are the type of unfair labor practices which, if not remedied, would affect the Union's status. Also, Respondent unlawfully implemented a different health insurance plan. Respondent had not remedied its unlawful conduct regarding these mandatory subjects of bargaining when it withdrew its recognition of the Union. Respondent has not demonstrated that before it commenced its campaign of unlawful conduct it had a good-faith doubt based on objective considerations. *Abbey Medical/Abbey Rents, Inc.*, 264 NLRB 969 (1982). As the United States Court of Appeals for the Ninth Circuit stated in *Clear Pine Mouldings v. NLRB*, 632 F.2d 721, 730 (1980):

> Reasonable doubt as to the majority status must only be asserted in good faith and may not be raised in the context of an employer's activities aimed at causing disaffection from the union. *NLRB v. Sky Wolf Sales*, 470 F.2d at 830. As this court recently stated, ''It would be inequitable to allow the Company to raise the issue of the Union's majority status when the Company has actively attempted to destroy that status. To allow this defense would be to condone the independent unfair labor practices.'' *NLRB v. B. C. Hawk Chevrolet, Inc.*, 582 F.2d 491, 495 (9th Cir. 1978).

Respondent failed to demonstrate a reasonably based good-faith doubt of the Union's majority status. Consequently, it could not lawfully withdraw recognition from the Union and when it did it violated Section 8(a)(1) and (5) of the Act.

Paragraph 5 of the consolidated amended complaint alleges that on May 12, Respondent, at its St. Louis facility,

unlawfully interrogated its employees regarding their union membership, activities, and sympathies and the union membership, activities, and sympathies of their fellow employees. As noted above, Respondent had already withdrawn recognition of the Union. Obviously, therefore, it could not have relied on information it obtained more than 2 weeks after it withdrew recognition. Respondent's attorneys in Donald Bippen's office with Donald Bippen present, interrogated employees, one at a time, about a union meeting which occurred after Respondent, as discussed above, unlawfully ceased making payments to the Health and Welfare Fund and the pension plan, unlawfully implemented its own medical plan, and unlawfully withdrew recognition from the Union. What occurred was interrogation. Respondent wanted to find out the results of the union meeting; it wanted to find out whether there was any justification, albeit belated or skewed, for refusing to recognize the Union. As pointed out in *Johnnie's Poultry Co.*, 146 NLRB 770, 775 (1964), in interrogating employees to verify majority status,

> The employer must communicate to the employee the purpose of the questioning; assure him that no reprisal will take place and obtain his participation on a voluntary basis; the questioning must occur in a context free from employer hostility to Union organization and must not be itself coercive in nature.

Here no legitimate purpose existed for Respondent's interrogations, which, in my opinion, were coercive, and no assurances against reprisal were extended to the employees. Respondent violated Section 8(a)(1) of the Act.

Paragraph 9 of the consolidated amended complaint alleges that during the months of September, December, and November 1988, Respondent and the Union met for the purpose of engaging in negotiations with respect to wages, hours, and other terms and conditions of employment of the unit; that during this period Respondent engaged in acts and conduct including setting time limits on contract negotiations, and making contract proposals designed to frustrate reaching a collective-bargaining agreement with the Union; and that Respondent has thereby failed and refused to bargain in good faith with the Union. As the Board stated in *Reichhold Chemicals*, 288 NLRB 69, 70 (1988):

> The Board's task in cases alleging bad-faith bargaining is the often difficult one of determining a party's intent from the aggregate of its conduct. . . .
>
> Each party to collective bargaining ''has an enforceable right to good faith bargaining on the part of the other.'' Enforcement of that right is one of the Board's most important responsibilities. Indeed, the fundamental rights guaranteed employees by the Act—to act in concert, to organize, and to freely choose a bargaining agent—are meaningless if their employer can make a mockery of the duty to bargain by adhering to proposals which clearly demonstrate an intent not to reach an agreement with the employees' selected collective-bargaining representative. [Footnotes omitted.]

In *Hotel Roanoke*, 293 NLRB 182, 184 (1989), the Board stated:

> In determining whether a party has bargained in bad faith, the Board looks to the totality of the circumstances in which the bargaining took place. *Port Plastics*, 279 NLRB 362, 382 (1986); *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984). The Board looks not only at the parties' behavior at the bargaining table, but also to conduct away from the table that may affect the negotiations. *Port Plastics*, 279 NLRB at 382.

In reviewing the totality of Kuna's conduct, including conduct that occurred away from the bargaining table, it is my opinion that the evidence establishes that Respondent violated the Act by refusing to bargain in good faith with the Union.

With respect to conduct that occurred away from the bargaining table, as noted above, Duff, who orchestrated Respondent's role, in his February 6 checklist wrote ''12 x New hires—advise will be Non-U.'' When, as a part of a settlement agreement, Respondent agreed to negotiate, Duff, more than once, sought information from the Board, while negotiations were taking place, regarding the procedures for decertification and withdrawing recognition from the Union. In my opinion, this conduct, in addition to conduct treated below, tends to show that Respondent never intended to make an honest effort to attempt to conclude an agreement with the Union.

As noted above, Duff, at the outset of negotiations, indicated that Respondent would not negotiate beyond a specified date in November. Notwithstanding the fact that the Union did not agree, Respondent continued to adhere to this position. In my opinion, Respondent's insistence was one more indication that Respondent was not bargaining in good faith. Respondent's insistence on this point ''was effective notice to the employees' bargaining representative that . . . [Respondent's] will was to prevail, whatever the Union desired.'' *Moore Drop Forging Co.*, 144 NLRB 165 (1963).

Regarding Respondent's above-described contract proposals, it is noted that in *Tomco Communications*, 220 NLRB 636 (1975), the Board stated:

> Rigid adherence to proposals which are predictably unacceptable to the Union may indicate a predetermination not to reach agreement, or a desire to produce a stalemate, in order to frustrate bargaining and undermine the statutory representative.

As General Counsel points out on brief, the themes throughout Respondent's contract proposals were to decrease wages and benefits and to give Respondent the sole option or discretion to do whatever it wanted without interference with the Union. Regarding wages, while Respondent proposed to reduce all the wages of those in the unit, it also proposed that it alone have the right to decide whether it wanted to pay any of the employees in the unit over scale (''red circle''). No business justification was demonstrated for these changes.

With respect to grievance and arbitration, since Respondent's proposed quality clause, as General Counsel points out, gives Respondent the sole discretion to determine if an employee's performance or productivity is substandard, Respondent would only need to claim that the employee's productivity was poor. Respondent would then have total discre-

tion, not subject to the grievance procedure, to discharge the employee.

Respondent proposed a very broad management-rights clause, namely, one which gave Kuna the right to schedule, transfer, assign, supervise, promote, demote, hire, suspend, discharge, change the size and composition of the work force, establish policies, work rules standards and regulations, determine products and product lines, determine or change the methods and means of operations and, among other things, carry out all the ordinary functions of management whether or not previously exercised by Kuna. Additionally, Kuna proposed removing the requirement that discharge be for cause.

In my opinion, the foregoing, in addition to positions taken by Respondent regarding other matters, i.e., freezing the unit (subsequently dropped), portion control, overtime, and the nondiscrimination clause, demonstrates that throughout the negotiations Kuna had a fixed intent not to reach agreement with the Union. The totality of Kuna's conduct and proposals establishes that it failed and refused to bargain in good faith with the Union in violation of Section 8(a)(5) and (1) of the Act.

Paragraph 10 of the consolidated amended complaint alleges that on or about December 1, Respondent implemented its final contract proposal and made numerous changes affecting the unit, including changing the health and welfare and pension plans covering the unit, and implementing new classifications and wage scales for the unit, and implementing a profit sharing plan on or about January 1, 1989; that these subjects relate to wages, hours, and other terms and conditions of employment of the unit and are mandatory subjects for the purposes of collective bargaining; and that Respondent engaged in these acts and conduct without reaching a valid impasse and, therefore, without having afforded the Union a sufficient opportunity to negotiate and bargain with respect to such acts and conduct. Since Respondent did not bargain in good faith, no real impasse was reached. Consequently, Respondent violated Section 8(a)(1) and (5) of the Act by implementing the above-described changes.

And finally, paragraph 8 of the consolidated amended complaint alleges that on or about January 1, 1989, Respondent withdrew its recognition of the Union as the exclusive collective-bargaining representative of the unit. As noted above, Respondent unlawfully failed and refused to bargain in good faith. It had not remedied its unlawful conduct when it withdrew its recognition on January 1, 1989. It did not act in good faith. Consequently it could not lawfully withdraw recognition and when it did, it violated Section 8(a)(1) and (5) of the Act.[18]

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act and at all times material is the representative for purposes of collective bargaining for the employees in the unit consisting of the following:

> Head meat cutter, journeymen and apprentice meat cutters, semi-skilled employees, custodians, porters, and laborers employed at the Respondent's St. Louis facility, excluding office clerical and professional employees, guards, and supervisors as defined in the Act.

3. By coercively interrogating its employees concerning their union membership, activities, and sympathies and the union membership, activities, and sympathies of their fellow employees, Respondent has violated Section 8(a)(1) of the Act.

4. The Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act by:

(a) Ceasing contributions to the involved pension plan on March 10, 1988, without prior notice to the Union and without having afforded the Union an opportunity to negotiate and bargain.

(b) Ceasing contributions to the Union's Health and Welfare Fund on April 10, 1988, without prior notice to the Union and without having afforded the Union an opportunity to negotiate and bargain.

(c) Implementing a different health insurance plan for the unit on April 25, 1988, without prior notice to the Union and without having afforded the Union an opportunity to negotiate and bargain.

(d) Withdrawing recognition of the Union as the exclusive collective-bargaining representative of the unit on April 25, 1988, and January 1, 1989.

(e) Setting time limits on contract negotiations and making contract proposals designed to frustrate reaching a collective-bargaining agreement with the Union during negotiations in September, October, and November 1988.

(f) Implementing on December 1, 1988, its final contract proposal and making numerous changes affecting the unit, including the health and welfare and pension plans covering the unit, reducing the number of holidays and vacation days for the unit, implementing new classifications and wage scales for the unit, and implementing a profit-sharing plan on January 1, 1989.

5. The unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act, it shall be recommended that Respondent cease and desist therefrom and take certain affirmative action.

It shall also be recommended that Respondent be ordered to recognize the Union and to bargain in good faith, on request, with the Union as the exclusive bargaining representative of its employees in the above unit, and in the event that an understanding is reached, to embody such understanding in a signed agreement.

Having found that Respondent has made unilateral changes in certain terms and conditions of employment in violation of Section 8(a)(5) and (1) of the Act, I recommend that Respondent revoke, upon request, said unilateral changes. Also, I recommend that Respondent be ordered to make whole its employees by making contributions to the health and welfare fund and pension plan, as provided for in the terms and conditions in the last collective-bargaining agreement between

[18] As noted above, Respondent pleads a number of affirmative defenses, none of which have any merit. The Regional Director acted reasonably in setting aside the aforementioned settlement agreement. Otherwise, matters raised by Respondent in its affirmative defenses do not require specific treatment herein.

Respondent and the Union, which contributions have not been made and which would have been made absent the Respondent's unlawful discontinuance of or refusal to make such contributions, and by reimbursing unit employees for any expenses, with interest, ensuing from the Respondent's failure to make such contributions.[19] Employees should also be made whole for any loss of earnings or other compensation they may have suffered by the unlawful refusal to apply the terms and conditions of employment as set forth in the collective-bargaining agreement which expired in April 1988, until such time as Respondent bargains in good faith to impasse or enters into a collective-bargaining agreement, with interest as authorized by *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[20]

ORDER

The Respondent, Kuna Meat Company, St. Louis, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating its employees concerning their union membership, activities, and sympathies and the union membership, activities, and sympathies of their fellow employees.

(b) Ceasing contributions to the involved pension plan and to the Union's health and welfare fund without prior notice to the Union and without having afforded the Union an opportunity to negotiate and bargain.

(c) Unilaterally implementing a different health insurance plan for the unit without prior notice to the Union and without having afforded the Union an opportunity to negotiate and bargain.

(d) Withdrawing recognition of the Union as the exclusive collective-bargaining representative of the employees in the appropriate collective-bargaining unit which is as follows:

> Head meat cutter, journeymen and apprentice meat cutters, semi-skilled employees, custodians, porters, and laborers employed at the Respondent's St. Louis facility, excluding office clerical and professional employees, guards, and supervisors as defined in the Act.

(e) Setting time limits on contract negotiations and making contract proposals designed to frustrate reaching a collective-bargaining agreement with the Union.

(f) Refusing to bargain in good faith while at the same time implementing contract proposals which make numerous changes affecting the terms and conditions of employment of the employees in the unit.

(g) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain in good faith with the Union as the exclusive representative of all employees in the aforesaid appropriate unit, and if an understanding is reached, embody such understanding in a signed contract.

(b) On request, rescind any and all unilateral changes the Respondent has made in the terms and conditions of employment of the employees in the involved unit.

(c) Make whole its unit employees by making contributions to the health and welfare fund and pension plan and reimburse unit employees for any expenses, with interest, ensuing from the Respondent's failure to make such contributions.

(d) Make whole its unit employees, with interest, for any loss of earnings or other compensation they may have suffered by Respondent's unlawful refusal to apply the terms and conditions of employment as set forth in the collective-bargaining agreement which expired in April 1988 until such time as Respondent bargains in good faith to impasse or enters into a collective-bargaining agreement.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at its St. Louis, Missouri place of business copies of the attached notice marked ''Appendix B.''[21] Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[19] *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981).

[20] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[21] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT coercively interrogate employees concerning their union membership, activities, and sympathies of their fellow employees.

WE WILL NOT cease contributions to the involved pension plan and to the health and welfare fund of the Meatcutters Union Local No. 88, United Food and Commercial Workers International Union, AFL–CIO without prior notice to the Union and without affording the Union an opportunity to negotiate and bargain.

WE WILL NOT unilaterally implement a different health insurance plan for the unit without prior notice to the Union and without affording the Meatcutters Union Local No. 88, United Food and Commercial Workers International Union, AFL–CIO an opportunity to negotiate and bargain.

WE WILL NOT withdraw recognition of the Meatcutters Union Local No. 88, United Food and Commercial Workers International Union, AFL–CIO as the exclusive collective-bargaining representative of the employees in the appropriate collective-bargaining unit which is as follows:

> Head meat cutter, journeymen and apprentice meat cutters, semi-skilled employees, custodians, porters, and laborers employed at the Respondent's St. Louis facility, excluding office clerical and professional employees, guards, and supervisors as defined in the Act.

WE WILL NOT set time limits on contract negotiations and make contract proposals designed to frustrate reaching a collective-bargaining agreement with the Meatcutters Union Local No. 88, United Food and Commercial Workers International Union, AFL–CIO.

WE WILL NOT refuse to bargain in good faith while at the same time implementing contract proposals which make numerous changes affecting the terms and conditions of employment of the employees of the unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, on request, bargain in good faith with the Meatcutters Union Local No. 88, United Food and Commercial Workers International Union, AFL–CIO as the exclusive representative of all employees in the aforesaid appropriate unit, and if an understanding is reached, embody such understanding in a signed contract.

WE WILL, on request, rescind any and all unilateral changes we have made in the terms and conditions of employment of the employees in the involved unit.

WE WILL make whole unit employees by making contributions to the health and welfare fund and pension pland and reimburse unit employees for any expenses, with interest, ensuing from our failure to make such contributions.

WE WILL make whole unit employees, with interest, for any loss of earnings or other compensation they may have suffered by our unlawful refusal to apply the terms and conditions of employment as set forth in the collective-bargaining agreement which expired in April 1988, until such time as Respondent bargains in good faith to impasse or enters into a collective-bargaining agreement.

KUNA MEAT COMPANY